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Abstract

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² On May 17, 2004, First Broadcasting Capital Partners, LLC became the licensee of Stations WOXY(FM) and WAXZ(FM). See File Nos. BALH-20040126AMT and BALH-20040127ADR.

much larger communities. As such, these stations are not considered a cost-effective alternative for advertisers targeting Oxford residents. Moreover, Beer questions whether the reallocation of Station WOXY(FM) from Oxford to Mason serves the public interest because Station WOXY(FM) would move to Mason, a "suburb" located in Cincinnati Urbanized Area. As a result, the rural community of Oxford would only receive local service from noncommercial educational Station WMUB(FM).

4. In response to the *Notice*, Gateway Radio filed a timely counterproposal requesting the allotment of Channel 249A at Livingston, Kentucky, as its first local service. To accommodate this proposed allotment, Gateway Radio requests the reclassification of Station WJXB-FM, Channel 248C, Knoxville, Tennessee as a Class C0 facility because the station operates below minimum Class C facilities. Gateway Radio also requests the reallocation of Channel 242A from Morehead to Salt Lick, Kentucky, as its first local service and the modification of the Station WIVY(FM) license to specify Salt Lick as its community of license. Gateway Radio also filed reply comments contending that the Joint Petitioners' allotment scheme would not constitute a preferential arrangement of allotments. In this regard, the reallocation of Station WRAC(FM), Channel 276A from West Union to Georgetown, Ohio would result in Station WVXW(FM) providing the sole local service to West Union. Gateway Radio claims that Station WVXW(FM) is a noncommercial educational station licensed as a satellite station for Station WVXU(FM), Cincinnati, Ohio. As such, Station WVXU(FM) is considered as a Cincinnati station rather than a local West Union station.

5. In response to Gateway Radio's counterproposal, South Central, the licensee of Station WJXB-FM, filed reply comments. South Central states that the filing of counterproposals that requests the Class C0 reclassification of a Class C station pursuant to the Commission's reclassification procedures is prohibited.³

6. The Joint Petitioners filed Reply Comments and Motion to Dismiss Counterproposal addressing Gateway Radio's counterproposal and Beer's comments. The Joint Petitioners state that the Gateway Radio counterproposal is defective because parties are prohibited from utilizing the Commission's reclassification procedures for Class C stations at the counterproposal stage of a rulemaking proceeding. Moreover, the Joint Petitioners contends that the counterproposal is not mutually exclusive with any of the proposed reallocations set forth in the *Notice*. In response to Beer's comments, the Joint Petitioners argue that the Station WOXY(FM) proposed reallocation is in the public interest because it would provide first local service to Mason without depriving Oxford of its only local service. Oxford would receive local service from noncommercial educational Station WMUB(FM). The Joint Petitioners states that the Commission has held that "noncommercial stations are relevant for purposes of analyzing local service to a community under Section 307(b) of the Act, and all noncommercial educational stations have an obligation to service significant programming needs of their communities."⁴

7. The Joint Petitioners also filed a Motion to Dismiss Reply Comments requesting the dismissal of Gateway Radio's reply comments because they are not legitimate reply comments. The Joint Petitioners states that the reply comments are irrelevant because it is established Commission policy that "satellite" stations are required to meet all local service obligations, including local programming. Moreover, the Joint Petitioners asserts that Gateway Radio's reply comments do not address any issues raised, the reply comments only provide supplemental information that should have been submitted with

³ See 1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 15 FCC Rcd 21649 (2000); see also note 2 to Section 1.420(g) and note 4 to Section 73.3573 of the Commission's Rules.

⁴ Citing *Crisfield, Maryland, et.al*, 18 FCC Rcd 19561 (MB 2003), *recon. granted in part*, 19 FCC Rcd 14612 (MB 2004).

the counterproposal. The Joint Petitioners contend that Gateway Radio's reply comments are procedurally defective and substantively irrelevant.

8. Gateway Radio filed a Request for Approval of Withdrawal of its counterproposal pursuant to Section 1.420(j) of the Commission's rules. Gateway Radio submitted a copy of the Option Agreement, which states that Gateway Radio entered into an Option Agreement with First Broadcasting to purchase radio station WAXZ-FM, Georgetown, Ohio for \$60,294 in exchange for the withdrawal of Gateway Radio's counterproposal. In connection with the Option Agreement, First Broadcasting agreed to reimburse Gateway Radio for its legitimate and prudent expenses of \$18,228.18, which was incurred in connection with this proceeding. In lieu of paying the reimbursement amount directly to Gateway Radio, First Broadcasting will apply the payment as consideration for the option granted under the Option Agreement. First Broadcasting filed a "Certification Pursuant to Section 1.420(j)" stating that First Broadcasting has not paid or promised any consideration in excess of Gateway's legitimate and prudent expenses in exchange for the withdrawal.

9. **Discussion.** Gateway Radio entered into an agreement with First Broadcasting to withdraw its expression of interest in the counterproposal in exchange for the opportunity to purchase Station WAXZ-FM and reimbursement of its legitimate and prudent expenses incurred in connection with this proceeding. Ordinarily, we would request additional documentation demonstrating the fair market value of Station WAXZ-FM to ensure that the purchase price of \$60,294 would not constitute excessive consideration under to 1.420(j) of the Commission's rules. However, consistent with the *Public Notice*⁵, announcing a 90-day settlement window for certain pending FM allotment proceedings, we will waive the provisions of Section 1.420(j) and grant Gateway Radio's Request for Approval of Withdrawal by dismissing the counterproposal.

10. The Joint Petitioners filed their request pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.⁶ When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment to determine whether the reallocation would result in a preferential arrangement of allotments based upon the FM Allotment priorities.⁷

11. In this instance, we will reallocate Channel 249A from Oxford to Mason, Ohio, as its first local service and modify the Station WOXY(FM) license accordingly.⁸ The reallocation results in a preferential arrangement of allotments because Channel 249A at Mason is mutually exclusive with the current use of Channel 249A at Oxford and the reallocation would not deprive Oxford of its only local service because noncommercial educational Station WMUB(FM) is currently licensed at Oxford. The establishment of first local service, priority (3), at Mason is preferred over the retention of second local service at Oxford, priority (4), other public interest matters.⁹ The Mason reallocation also results in a

⁵ *Window Announced for Universal Settlements of Pending Rulemaking Proceedings to Amend FM Table of Allotments*, 20 FCC Rcd 10756 (MB 2005) ("Public Notice").

⁶ *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part 5 FCC Rcd 7394 (1990).

⁷ The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1988).

⁸ Channel 249A can be allotted to Mason in compliance with the Commission's spacing requirements provided there is a site restriction 9.4 kilometers (5.8 miles) east at reference coordinates 39-20-57 North Latitude and 84-12-08 West Longitude.

⁹ *Id.* note 6.

population net gain of 621,958 persons, while the loss area would continue to receive at least 5 other aural services. Therefore, this area is considered to be well-served. Mason is located inside the Cincinnati Urbanized Area and would place a 70 dBu contour over 13.2 percent of the urbanized area, whereas Oxford is not located in an urbanized area. The Joint Petitioners have provided a *Tuck* showing demonstrating that Mason is sufficiently independent of the Cincinnati Urbanized Area to warrant a first local preference.

12. Additionally, we will reallocate Channel 249A from Georgetown, Ohio to Salt Lick, Kentucky, as its first local service and modify the Station WAXZ(FM) license accordingly.¹⁰ The reallocation of Station WAXZ(FM), Channel 249A to Salt Lick is mutually exclusive with the current use of Channel 249A at Georgetown and would not deprive Georgetown of its only local service because we will grant the reallocation of Station WRAC(FM), Channel 276A from West Union to Georgetown to prevent removal of sole local service.¹¹

13. The Station WAXZ(FM) reallocation would result in a preferential arrangement of allotments because Salt Lick would receive first local service, priority (3), whereas a second local service at Oxford and West Union along with the retention of local service at Georgetown would result in other public interest matters, priority (4). Salt Lick is not located in an urbanized area and the proposed 70 dBu contour of Station WAXZ(FM) will not encompass more than 50 percent of an urbanized area. Therefore, a *Tuck* showing is not required because the reallocation would not implicate the Commission's policy against migration of stations from rural to urban areas. The relocation of Station WAXZ from Georgetown to Salt Lick results in a population net gain of 45,794 persons. The loss area is considered well-served because Georgetown will continue to receive at least five other aural services.

14. The reallocation of Station WRAC(FM), Channel 276A from West Union to Georgetown, Ohio prevents the removal of Georgetown's sole existing local service. The reallocation is mutually exclusive with the current use of Channel 276A at West Union and would not deprive West Union of its only local service because noncommercial educational FM Station WVXW is currently licensed to West Union.¹² The reallocation results in a population net gain of 23,960 persons, while the loss area is well-served because it would receive service from at least five other aural services.

15. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

16. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective September 12, 2005, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

¹⁰ Channel 249A can also be allotted to Salt Lick in compliance with the Commission's spacing requirements provided there is a site restriction 6.6 kilometers (4.1 miles) northeast at reference coordinates 38-10-15 North Latitude and 83-34-31 West Longitude.

¹¹ Channel 276A can also be allotted to Georgetown in compliance with the Commission's spacing requirements provided there is a site restriction 12.1 kilometers (7.5 miles) east of at reference coordinates 38-52-14 North Latitude and 83-45-55 West Longitude..

¹² Commission records indicate that while Station WVXU(FM), File No. BPED-19930628KD, was granted a waiver of the Commission's main studio rule, 47 C.F.R. § 73.1125, to operate as a "satellite" of Station WVXU-FM, Cincinnati, Ohio, the primary obligation of a broadcast licensee, including a satellite station, is to serve the local problems, needs and interests of its community of license. See *Fort Bragg and Willits, California*, 11 FCC Rcd 16421 (MMB 1996).

<u>Communities</u>	<u>Channel No.</u>
Georgetown, Ohio	276A
Mason, Ohio	249A
Oxford, Ohio	-----
Salt Lick, Kentucky	249A
West Union, Ohio	-----

17. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of First Broadcasting Capital Partners, LLC, for Station WOXY(FM), Channel 249A, Oxford, Ohio, IS MODIFIED to specify operation on Channel 249A at Mason, Ohio to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of Station WOXY(FM) shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

18. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of First Broadcasting Capital Partners, LLC for Station WAXZ(FM), Channel 249A, Georgetown, Ohio, IS MODIFIED to specify operation on Channel 249A at Salt Lick, Kentucky, subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of Station WAXZ(FM) shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

(d) Operation of Station WAXZ(FM) on Channel 249A at Salt Lick Kentucky, including program test operation pursuant to 47 C.F.R. Section 73.1620, will not be permitted until Station WRAC(FM) activates service on Channel 276A at Georgetown, Kentucky.

19. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of Dreamcatcher Communications, Inc. for Station WRAC(FM), Channel 276A, West Union, IS MODIFIED to specify operation on Channel 276A at Georgetown, Kentucky, subject to the following conditions:

(a) Within 90 days of the effective date of the *Order*, the licensee of Station KBRU-FM shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

20. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (3)(l) of the Commission's rules, First Broadcasting Capital Partners, LLC, licensee of Stations WOXY(FM), Oxford, Ohio, and WAXZ(FM), Georgetown Ohio, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for Station WOXY(FM) to specify operation on Channel 249A at Mason and Station WAXZ(FM) to specify operation on Channel 249A at Salt Lick, Kentucky at the time its Form 301 application is submitted. Dreamcatcher Communications, Inc., licensee of Station WRAC(FM), West Union, Ohio is also required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for Station WRAC(FM) to specify operation on Channel 276A at Georgetown, Ohio at the time its Form 301 application is submitted.

21. IT IS FURTHER ORDERED, That the counterproposal filed by Gateway Radio Works, Inc. IS DISMISSED.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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